

TECHNOLOGY A Special Report

Jurors, Watch the Screen

Trial lawyers choose more sophisticated means of persuasion.



BY ALVIN F. LINDSAY AND KHIZR KHAN

For most of the history of jurisprudence, pens, paper, and law books were the tools of the lawyer's trade. That's all changed. Of course, lawyers have been using computers for legal writing and research for some time, but, increasingly, today's top attorneys are harnessing the power of technology for more than just creating documents. They are using it to persuade.

Presentation technology—the use of computers and display equipment to present evidence to jurors and other finders of fact—has played a starring role in virtually every high-profile trial in recent memory. Dream teams defending O.J. Simpson, Robert Blake, and Michael Jackson all used presentation technology at trial.

But until recently, most lawyers remained skittish about technology. A 2002 American Bar Association legal technology survey found that only 30 percent of lawyers used a laptop in court and 29 percent regularly used evidence-presentation software.

GOLIATH EFFECT

Apparently, lawyers—especially those representing well-heeled corporate clients—worried about the Goliath effect: the perception that jurors would resent a “deep-pocketed” client who could afford sophisticated graphics. Lawyers also may have wanted to avoid looking foolish by misusing the technology or having it fail at the wrong time.

But as technology has become less expensive and more reliable, lawyers are coming to grips with the fact that jurors, after years of processing graphic information on television, seem to understand and appreciate skillful computer-assisted presentations. And any worry about technology users appearing to be the “Goliaths” went down with the price of flat-screen monitors.

“Jurors love the PowerPoint,” says Brian Lerner, a Miami employment litigator for Hogan & Hartson who recently became privy to the type of jury reaction most lawyers never

get to see. He attended a trial-skills “boot camp” this summer. After arguing a “mock” case before jurors selected from the community, Lerner had the opportunity to watch the usually closed deliberation process.

According to Lerner, long gone are the days when jurors might have felt that evidence presentation was a luxury only the privileged could afford. “They all seemed to know that anyone with a laptop can do this.” In fact, he adds, “the jurors on our case seemed to expect it.” Lerner warns, however, that “You can't just throw it up there. Jurors are more sophisticated than that.” While they may expect technology, they also expect it to be “tight and concise.” But, he notes, “When done right, it's easy to follow and helps tell your story.”

In fact, every day more and more attorneys are showing up in court armed with their technological weapons. When Hogan & Hartson senior litigator George Mernick recently defended and defeated a \$30 million medical-negligence case involving informed consent in clinical trials, he relied exclusively on a digital-electronic-display system. His opponent stuck to the time-honored techniques of putting evidence on foam-core boards and in exhibit notebooks.

“The difference was night and day,” Mernick says. With a large screen on the wall opposite the jury and a specialized litigation software program, Mernick pulled up digitized document images from a laptop. Those images were fed to a projector for the large screen as well as to other flat-screen monitors for the judge and witness. Mernick soon realized that “you have more control over where they are looking and you can tell they are paying attention to you a lot better.”

In that case, the opposing counsel's use of boards and a notebook given to each juror seemed less than helpful.

“As they would go through examination of a witness they would ask the witness to open up the notebook to a certain tab, and the jurors were expected to turn to the same tab,” notes Mernick. “But jurors would become hopelessly confused simply trying to keep up with which tab was supposed to be the focus of

attention at any moment. Whereas if we wanted to go from document to document, we just put it on the screen with no confusion about what we are talking about, and no worry about whether Juror 3 was looking at the same exhibit as Juror 4. Literally, as well as figuratively, everybody was on the same page all the time.”

For Mernick, this was more than just a way to enlarge documents. “Besides the documents and deposition pages in the case, we also generated quite a few of our own graphics,” he says, “because we had to explain to the jury things like what leukemia is, what bone marrow is, and how chemotherapy works. This was an awful lot for non-scientists to drink in, but we could walk them through it, and it came alive and made sense, much more than if you just had somebody talking.”

With a plethora of doctors as both fact and expert witnesses, Mernick also used technology to remind the jury of who testified. “We took a picture of each expert witness wearing the clothes they wore on the day they were on the stand,” he says. At the closing arguments at the end of the two-month trial, “we put the pictures up and said, ‘You remember Dr. Nathan,’ which made it easy to distinguish this doctor from the other 25 doctors who testified during the case.”

THE WIRED COURTROOM

While the norm is for lawyers to bring their own projectors and monitors to court if they intend to make digital presentations, many new federal and state courtrooms are now being built pre-wired for electronic-evidence display. The federal District Court for the D.C. Circuit, for example, has retrofitted three of its courtrooms with permanent evidence-presentation technology that includes document cameras (think of an old-fashioned overhead projector, but with a video camera instead of a prism), telestrators like the kind John Madden uses to diagram plays on “Monday Night Football,” two-way video conferencing, and the ability to plug in and display computer graphics from a laptop at either the counsel table or, in case experts need to give their own presentations, from the witness stand. Lawyers in the D.C. Circuit whose cases are not assigned to one of the three pre-wired courtrooms may use one of the five mobile presentation packages the court provides.

The word is that judges, too, are increasingly appreciating the precision and time-saving capabilities of courtroom technology. Studies show that trials move anywhere from 20 percent to 35 percent faster using technology because the need to pass around documents and flip pages is eliminated. Recently, Winston & Strawn’s well-known litigator Dan Webb spent more than eight months defending his client, Philip Morris, in D.C. federal court.

Although one participant quipped that the courtroom “looked like a Circuit City showroom,” the case may well have lasted almost a year without the efficiency of technology. Anything that moves along a lengthy trial has to sit well with the court.

Courtroom presentations, however, may just be the beginning. Hogan’s international arbitration attorneys Daniel Gonzalez and Richard Lorenzo recently battled a \$100 million construction action involving allegations of 177 defects against the builder of a South American petrochemical plant. The “jury” in this case was a panel of three arbitrators, each of whom lived in a different city. Gonzalez and Lorenzo knew they had to educate the panel as to the science and mechanics of each of these defect claims, which would have been difficult with words alone.

Their solution was to provide each panel member with a laptop computer—returned at the end of the proceedings—custom-loaded with electronic versions of the “paper” briefs as well as more than 14 gigabytes of information, including thousands of hyperlinks to video, photographs, deposition testimony, document images, graphics, and animations.

“This was the ultimate e-brief,” Lorenzo says of the laptops. “When you turn on the computer you are immediately taken to a menu of options, each specifically crafted to educate about the nature and extent of each defect as well as the repairs that were needed.” Gonzalez believes the laptops were the major factor contributing to an early settlement. “It’s one thing to describe the flaw in a granulation atomizer, but when you can demonstrate that flaw through digital video to a panel of arbitrators hundreds of miles away, the power of technology really becomes clear.”

To be sure, many trial lawyers still eschew technology, preferring instead traditional low-tech presentation devices like the foam-core boards or oversized pads of “butcher paper.” But these lawyers are increasingly becoming like the typists who swore they would never give up their old Royal typewriters at a time when everyone was moving to the first-generation PCs. In time, the crisp precision of computer-generated work product became expected, and eventually even the traditionalists had to come around.

Today it would seem that the competitive advantage held by the technology-using lawyers is rapidly waning. Just as lawyers are now expected to type their briefs using computers, soon they will likely be expected to use their computers to persuade, as well.

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